IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 16.08.2007

Coram :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN
and
THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

Tax Case Nos.387 and 388 of 2004

The Income Tax Officer,
Ward I (V), Erode. Appellant

v.

K.M.Pachiappan Respondent

Tax Case Appeals filed under section 260-A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal 'B' Bench, Madras dated 07.12.2000 made in 564/Mds/99 & 565/Mds/99 against the order of the commissioner of Income Tax (Appeals) Coimbatore dated 17.2.1999 in ITA No.674-C/96-97 and 327-C/98-99 against the order of Income Tax Officer, Ward-I (5), Erode in PAN GIR No.P-5028/I/51/ERD dated 1.8.96 and 21.1.98 respectively.

For Appellant : Mr.T.Ravikumar,
Standing Counsel for IT Dept.
For Respondent : No appearance

JUDGMENT

(Judgment of the Court was delivered
by K.RAVIRAJA PANDIAN, J.)

These appeals are filed by the revenue aggrieved by the order of the Income Tax Appellate Tribunal dated 07.12.2000, framing the following questions of law :

"1. Whether on the facts and circumstances of the case, the Tribunal was right in law in not considering the Explanation 2 to section 147 which provides that 'the assessing officer can reopen the assessments even if the assessments have not been completed under section 143 and only intimation had been sent, if the conditions laid under section 147 are fulfilled?

2. Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal is right in not considering

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that the addition of incentive bonus to the total income is proper or not, in view of the decision of the Madras High Court in the case of CIT v. E.A.Rajendran reported in 235 ITR 514 in which it has been held that no deduction except what has been allowed under section 16, is admissible?

2. The facts, as culled out from the statement of facts, are as under :

The assessee is a Development Officer of the Life Insurance Corporation of India. He filed his return for the assessment year 1994-1995 on 28.03.1996 claiming 50% deduction, as expenditure in the total incentive bonus. The return was processed under section 143(1) of the Income Tax Act, 1961 and notice under section 148 of the Act was issued on 18.06.1996. The case was taken up for scrutiny and the assessing officer passed an order under section 143(3) read with section 147 of the Income Tax Act and added incentive bonus in the income of the assessee. The assessment for the year 1995-96 was also concluded under section 143(3) read with section 147 to the same effect after issuing notice under section 148 of the Act. Aggrieved by that order, the assessee preferred appeals before the Commissioner of Income Tax (Appeals) by contending that during the pendency of valid return, reassessment proceedings cannot be initiated. The appeals were dismissed and therefore, the assessee carried the matter to the Income Tax Appellate Tribunal by way of second appeals by contending that the returns were processed under section 143(1)(a) initially which wiould not amount to disposing of the same simply because intimation under section 143(1)(a) was deemed to be a notice of demand under section 156 of the Income Tax Act. It was further contended that the notices subsequently issued under section 148 of the Act were not valid and the assessments were liable to be set aside. The Tribunal accepted the contentions of the assessee and allowed the appeals by setting aside the order of the Commissioner of Income Tax (Appeals) holding that during the pendency of the valid return, re-assessment proceedings could not be initiated. The correctness of the same is now canvassed before this Court.

3. We heard the arguments of counsel on either side and perused the materials available on record.

4. In order to resolve the first question of law, we are of the view that it is better to have the relevant provision extracted. Section 147 read as under :

"S.147. Income escaping assessment.

If the assessing officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned -

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Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chageable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

Explanation I – Production before the assessing officer of account books or other evidence from which material evidence could with due diligence have been discovered by the assessing officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2 – For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely,

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the assessing officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(c) where an assessment has been made, but --

i. income chargeable to tax has been under-assessed; or

ii. such income has been assessed at too low a rate; or

iii. such income has been made the subject of excessive relief under this Act; or

iv. excessive loss or depreciation allowance or any other allowance under this Act has been computed.

5. Section 147 authorises or empowers the assessing officer to assess or reassess any income chargeable to tax, if he has reason to believe that the income for the assessment year has escaped assessment. The powers so vested with the assessing officer has to be exercised subject to the provisions of sections 148 to 153 of the Act. Thus, the condition precedent for proceeding under section 147 is that the assessing officer should have reason to believe that the income has escaped assessment. It is not necessary that the assessment should have been completed under section 143(3) of the Act before it could be reopened. The intimation under section 143(1) though technically was deemed to be a demand notice under section 156, that did not preclude the assessing officer to proceed under section 143(2) and pass an order under section 143 of the Act. If the assessing officer has reason to believe that the income has escaped assessment while issuing intimation under section 143(1) he could proceed further under sections 147/148.

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The absence of an order under section 143(3) is not a bar. The proviso to section 147 which provides that no action shall be taken under the section after expiry of four years from the end of relevant assessment year in a case where an assessment under section 143(3) has been made for relevant assessment year indicates that section 147 can be invoked not only after an order has been passed under section 143(3) of the Act, but even otherwise before such an order is passed. Further more sub-clause (b) of Explanation 2 also makes the position amply clear that where a return of income has been furnished by the assessee, but no assessment has been made and it is noticed by the assessing officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return, that would deemed to be a case where income chargeable to tax has escaped assessment and becomes a cause for invoking the power under section 147 of the Act.

6. This issue has been considered by various High Courts. In the case of CIT v. Abad Fishers, (2002) 258 ITR 641, the Kerala High Court answering the question whether the Tribunal was right in holding that the reopening of the assessment is valid, in a case where the assessment has been reopened under section 147 of the Act, since the time to issue a notice under section 143(2) of the Act was over, referred with approval the decision in the case of Mahanagar Telephone Nigam Ltd. v. Chairman, CBDT, (200) 246 ITR 173 wherein the Delhi High Court held that the intimation under section 143(1)(a) of the Act could not be treated to be an order of assessment and that a distinction was well brought out by the statutory provisions as they stood at different points of time, that the intimation under section 143(1)(a) was deemed to be a notice of demand under section 156, for the apparent purpose of making machinery provisions relating to recovery of tax applicable. By such application only recovery of the amount indicated to be payable in the intimation became permissible. And nothing more could be inferred from the deeming provision, the Kerala High Court held that so long as the ingredients of section 147 are fulfilled, the assessing officer was free to initiate proceedings under section 147 and failure to take steps under section 143(3) would not render the assessing officer powerless to initiate reassessment proceedings even when intimation under section 143(1) had been issued.

7. The Punjab and Haryana High Court in the case of Punjab Tractors Ltd. v. Joint Commissioner of Income Tax, (2002) 254 ITR 242 held that if the assessing officer had reason to believe that any income chargeable to tax had escaped assessment for any assessment year, he could proceed to assess or reassess such income. Thus, the condition precedent for proceeding under section 147/148 was that the assessing officer should have reason to believe that income had escaped assessment. Nothing more. It was not necessary that assessment should have been finalised under section 143(3) before it could be reopened. The intimation under section 143(1) operated as an order of assessment unless the authority proceeded to give notice under section 143(2) and passed an order under section 143(3). The Court further held that if the competent authority had reason to believe that income had escaped assessment while issuing intimation under section 143(1), it could proceed under section 148. The absence of an order under section 143(3) is no bar.

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8. In one another case - Metal Products of India v. CIT, (2006) 204 CTR 389, the Punjab and Haryana High Court rejected a contention raised therein by holding that there was no weight in the arguments that once the returns were processed under section 143(1) of the Act, proceedings under section 147 of the Act could not be initiated. If the ingredients of section 147 of the Act are satisfied, there was no bar to initiation of proceedings under section 147 of the Act.

9. The Supreme Court in the case of Assistant CIT v. Rajesh Jhaveri Stock Brokers P. Ltd., (2007) 291 ITR 500 after elaborately considering the provisions of section 143 of the Act prior to and subsequent to amendment with effect from the 1st June, 1999 and having regard to the explanation 2 to section 147 of the Act, observed :

> "The scope and effect of section 147 of the Act, as substituted with effect from April 1, 1989 as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied : firstly, the assessing officer must have reason to believe that income profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the assessing officer could have jurisdiction to issue notice under section 148 read with section 147(a). But under the substituted section 147 existence of only the first condition suffices. In other words, if the assessing officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. ..... So long as the ingredients of section 147 are fulfilled, the assessing officer is free to initiate proceedings under section 147 and failure to take steps under section 143(3) will not render the assessing officer powerless to initiate reassessment proceedings even when intimation under section 143(1) had been issued.

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10. For the reasons stated above and in the light of the pronouncement of the Supreme Court and the judgments of the High Courts referred to supra, we are of the considered view that the order of the Tribunal impugned in this appeal has to be set aside and the same is set aside by allowing the appeal.

11. As the Tribunal has concluded that the assessing officer could not proceed further under section 147/148 of the Act, when the returns filed pending it, did not consider the second question framed in this appeal. Now that the order of the Tribunal is set aside by us on the

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first question of law, the matter is remitted back to the Tribunal to consider the second issue also afresh after giving reasonable opportunity.

sd/-
Asst.Registrar

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Sub Asst.Registrar

mf

To

1. The Assistant Registrar Income Tax
   Appellate Tribunal, III Floor,
   Rajaji Bhavan, Besand Nagar, chennai.90.

2. The Commissioner of Income tax (Appeals),
   Coimbatore.

3. The Income Tax Officer,
   Ward I (V), Erode.

+ 1 cc to Mr.N.Muralikumaran, Advocate SR.NO.51437

JSK(CO)
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